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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FEIST PUBLICATIONS, INC.

Petitioner,

v.

RURAL TELEPHONE SERVICE COMPANY, INC.

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly concluded that respondent's decision against cooperating with petitioner did not harm competition and that petitioner therefore failed to prove its claim under § 2 of the Sherman Act.

PARTIES TO THIS PROCEEDING

The caption of the case in this Court contains the names of all parties. Respondent Rural Telephone Service Company, Inc. is a Kansas cooperative owned by its subscriber-owners.

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Rural Telephone Service Company, Inc. ("Rural") respectfully submits this brief in opposition to the petition for writ of certiorari filed by petitioner Feist Publications, Inc. ("Feist" or "petitioner").

OPINIONS BELOW

Rural agrees with petitioner's statement of the opinions below except that the district court's denial of Rural's motion for reconsideration (Petitioner's Appendix ("Pet. App.") 31a-34a) is found at 1990-2 Trade Cas. (CCH) ¶ 69,236 (D. Kan. 1990).

JURISDICTION

The Court of Appeals entered judgment on February 19, 1992. Feist filed its certiorari petition on May 18, 1992, and on September 23, 1992, the Court requested that Rural file a response on or before October 23, 1992. Feist has invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Rural is a non-profit cooperative telephone company owned by its 4700 subscribers in northwest Kansas. Pet. App. 7a. Rural was formed as a result of the need to provide telephone service in an area that had none. As one of Rural's employees testified at trial about Rural's beginnings:

> [Y]ou are looking at an area that no one else in the State of Kansas or in the country wanted to provide service to. . . . These people . . . had no telephone service, so a group of farmers and individuals got together, and said what can we do to resolve this situation. They created the Rural Telephone Service Corporation, went door to door begging for people to sign up, getting [a] $30.00 fee wherever they could to start a fund so they could go to the bank and try to borrow, get telephone service started. They went for several years without turning a profit, and just gradually expanded where they could.

Trial Transcript ("Tr.") Vol. III at 161-62.

The Kansas Corporation Commission (the "KCC") regulates Rural's provision of telephone service in several important respects. First, the KCC sets the

rates Rural may charge for telephone service. Kan. Stat. Ann. §§ 66-128 (1990). Second, the KCC requires Rural to rebate to its subscriber-owners all revenue Rural receives that exceeds Rural's cost of doing business. Pet. App. 6a n.8, 7a; Tr. Vol. III at 108, 171-72, 205. Third, the KCC requires Rural to provide an annual telephone directory to Rural's subscriber-owners. Pet. App. 8a. Rural's directory consists of yellow pages advertising and white pages listings, which list the subscriber-owners' names, addresses and telephone numbers. *Id.*

Because the KCC sets Rural's service rates based upon Rural's total revenue, Rural's sale of yellow pages advertising lowers the service rates that Rural's subscriber-owners pay. Tr. Vol. I at 35-36. Rural's ability to sell yellow pages advertising thus has a direct effect on the prices Rural's subscriber-owners pay for telephone service.

Feist is a privately held, for-profit Kansas corporation that distributes telephone directories. Pet. App. 8a. Feist, like Rural, sells yellow pages advertising. *Id.* In 1978, Feist approached Rural and asked to purchase Rural's copyrighted white pages listings at a price of ten cents per listing (approximately $470.00 total). Pet. App. 9a; Tr. Vol. I at 29-31. Rural's board of directors met and considered the proposal but decided not to accept Feist's offer at that time. Pet. App. 9a; Tr. Vol. III at 191-92.

The district court found that Rural's decision was based upon the concern that sharing its listings with Feist would cause Rural to lose yellow pages advertising revenue. Pet. App. 23a-24a; Tr. Vol. I at 35-36. Given the KCC's regulatory scheme, such a reduction in Rural's yellow pages advertising revenue

necessarily would have resulted in an increase in the rates Rural's subscriber-owners would have had to pay for telephone service. Tr. Vol. I at 35-36.

After Rural's directors tabled Feist's request, Feist simply copied Rural's white pages listings from Rural's published directory. Tr. Vol. II at 35-36. Shortly thereafter, in the fall of 1978, Feist launched its northwest Kansas telephone directory in competition with Rural's directory. *Id.* Prior to 1983, when Rural sued Feist for copyright infringement, Feist never complained to Rural about Rural's decision not to share its listings, nor did Feist ever mention a possible antitrust claim against Rural. Tr. Vol. II at 29-30, 43; Vol. III at 192-93.

In each year during 1978-1987, the time period addressed at trial, Feist distributed its northwest Kansas directory in competition with Rural's directory. Tr. Vol. II at 4. Feist's share of yellow pages advertising sold to merchants within Rural's service area (the relevant market defined by the district court) rose from zero to twenty percent. Pet. App. 11a (table). Significantly, Feist achieved its success while charging higher prices than Rural, as the following table demonstrates:

Price Per Quarter Column Ad

Directory Year	Feist ($)	Rural ($)
1978	n/a	108.00
1979	200.00	126.00
1980	200.00	135.00
1981	200.00	165.00
1982	200.00	181.80
1983	275.00	218.40
1984	275.00	246.60
1985	275.00	276.00
1986	324.00	303.00
1987	324.00	333.60

Ex. U-1. In addition, ninety-five percent of the respondents to a survey Feist commissioned in 1982 were aware of and had a copy of Feist's directory. Ex. 18; Tr. Vol. I at 54-56. Many of the survey respondents used Feist's directory considerably more often than they used the local telephone company's directory. *Id.*

Despite its success, Feist claimed at trial that access to Rural's listings was "essential" to Feist's ability to sell yellow pages advertising. The district court found that Feist's evidence did not substantiate this claim:

> FP [Feist] was unable to identify *anyone* who had refused to purchase yellow pages advertising in its directory because the FP northwest directory did not contain complete listings from the RTSC [Rural] service area.

> FP was also unable to identify *anyone* who had complained that the FP northwest directory was incomplete.
>
> * * * *
>
> The information contained in [Rural's] listings can be independently obtained from other sources. FP was unable to point to any regulatory restrictions in obtaining the information. In addition, FP did not persuade the court that acquiring this information was either impossible or economically impractical.

Pet. App. 11a, 22a (emphasis added). *See also* Tr. Vol. II at 52 (Feist's president could not identify a single merchant who refused to purchase an ad in Feist's directory); Tr. Vol. II at 93 (same); Tr. Vol. III at 15-16 (same).

This litigation began in 1983, when Rural sued Feist for copyright infringement. *See Feist Publications, Inc. v. Rural Telephone Service Co.*, ___ U.S. ___ , 111 S.Ct. 40 (1990). Feist responded to Rural's copyright claim by filing a counterclaim asserting that Rural's decision, five years earlier in 1978, not to share its white pages listings with Feist violated § 2 of the Sherman Act.

On April 5, 1990, following a brief bench trial conducted in 1988, the district court entered judgment against Rural on Feist's counterclaim. *Rural Telephone Service Co. v. Feist Publications, Inc.*, 737 F. Supp. 610 (D. Kan. 1990). Pet. App. 7a-30a. The district court subsequently denied Rural's motion for reconsideration. *Rural Telephone Service Co. v. Feist Publications, Inc.*, 1990-2 Trade Cas. (CCH) ¶ 69,236 (D. Kan. 1990). Pet. App. 31a-34a.

On February 19, 1992, the Court of Appeals reversed the district court's judgment for Feist, on the ground that Rural's decision not to share its white pages listings with Feist was lawful. *Rural Telephone Service Co. v. Feist Publications, Inc.*, 957 F.2d 765 (10th Cir. 1992). Pet. App. 1a-6a. The court expressly held that Rural did not violate § 2 because Feist "failed to prove Rural Telephone's refusal to deal had anti-competitive effects. . . ." Pet. App. 4a; *see also id.* 6a ("Because Feist Publications has failed to prove harm to competition, its antitrust claim must fail.").

REASONS FOR DENYING THE WRIT

The Court of Appeals' decision rejecting petitioner's antitrust claim for failure to prove harm to competition is consistent with this Court's decisions and the decisions of all other circuits. The certiorari petition raises only fact-bound questions, not worthy of this Court's attention, regarding the Court of Appeals' application of a long-standing antitrust principle to evaluate Rural's decision not to share its white pages listings with Feist. Moreover, the issue presented in the petition would have no effect on the outcome of this case because there are several additional grounds for overturning the district court's decision, which the Court of Appeals did not reach due to its holding on the harm-to-competition issue. The Court therefore should deny the petition.

A. The Court Of Appeals' Decision Properly Followed This Court's Pronouncements Requiring Proof Of Harm To Competition In Antitrust Litigation.

Petitioner first contends that the Court of Appeals' holding conflicts with this Court's decisions in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), and

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985). However, the decision below both relied on and scrupulously followed both *Grinnell* and *Aspen Skiing*, and adhered to the long line of cases holding that harm to competition must be established in order to sustain a claim under the antitrust laws. Pet. App. 3a-4a, 5a.

For four decades this Court consistently has held that the antitrust laws were enacted for "the protection of *competition*, not *competitors*." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Cargill v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986); *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) ("*ARCO*"). As recognized by the Court in *Aspen Skiing*, there is no exception to this requirement for § 2 claims. *See* 472 U.S. at 605.

The Court of Appeals quoted and relied on this Court's articulation in *Grinnell* of the elements of a § 2 claim. Pet. App. 3a-4a. In *Grinnell*, this Court explained that "[t]he offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident." 384 U.S. at 570-71. Petitioner concedes that the Court in *Aspen Skiing* interpreted the *Grinnell* test to require proof that " '[the refusal] has impaired competition in an unnecessarily restrictive way.' " Pet. at 6 (quoting *Aspen Skiing*, 472 U.S. at 605). Petitioner's only complaint is that the Court of Appeals erred when it applied this standard to the

facts of this case and held that "Feist Publications has failed to prove harm to competition," and that therefore "its antitrust claim must fail." Pet. App. at 6a.

As the Court of Appeals observed, the district court "did not make a specific finding of harm to competition." Pet. App. 4a-5a. The district court did find, however, that Feist "was unable to identify anyone who had refused to purchase yellow pages advertising in its directory because the [Feist] northwest directory did not contain complete listings from [Rural's] service area." Pet. App. 11a. Feist "also was unable to identify anyone who had complained that [Feist's] northwest directory was incomplete." *Id.* The Court of Appeals also noted:

> Feist Publications offered no proof competition in the yellow pages advertising market was reduced as a result of Rural Telephone's actions. Between 1978 and 1987, Feist Publications' market share rose from zero to twenty percent. Further, during the same years, the price for a quarter column ad remained competitive, with Feist Publications generally charging substantially more than Rural Telephone. Finally, due to different publication dates, Feist Publications' directory often contained listings not available in Rural Telephone's directory.

Pet. App. 6a.

Thus, rather than showing harm to competition, the evidence below proved that Rural's decision not to cooperate with Feist increased competition, to the benefit of directory advertisers and consumers. Ap-

plying the principles set out in *Grinnell* and *Aspen Skiing*, the Court of Appeals correctly determined Feist's lack of proof of harm to competition to be "fatal" to Feist's case. Pet. App. 6a. As this Court explained in *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 116 (1975), "The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors."

Petitioner seeks to avoid its failure to prove harm to competition by asserting that the Tenth Circuit somehow "added an additional requirement of specific proof of 'harm to competition' to the burden Feist must carry to establish its cause herein." Pet. at 5. There are two fatal flaws in this argument.

First, as discussed above, this Court's *Brown Shoe*, *Brunswick*, *Cargill*, *ARCO*, *Grinnell* and *Aspen Skiing* decisions, not just the decision below, required petitioner to prove harm to competition. The Court of Appeals' decision did not create any new standard for antitrust analysis. The court merely applied a basic antitrust principle to the undisputed facts of this case and found Feist's proof wanting. As the Court of Appeals did not announce any new principle of law, but instead merely applied a principle announced long ago by this Court, Feist's petition does not merit this Court's review. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice* 223 (Sixth ed. 1986) ("Certainly, to the extent that

a 'correct' decision is a restatement of 'settled law,' review on certiorari becomes patently inappropriate.").

Second, petitioner's argument that the Tenth Circuit "added an additional requirement" to petitioner's burden of proof is belied by the Court of Appeals' decision. The Court of Appeals did not engraft a new element onto § 2. Instead, the court examined the record for evidence of harm to competition "[i]n determining" whether Rural "acted lawfully or in violation of § 2." Pet. App. 3a. The Tenth Circuit properly held that Rural's "conduct" was lawful and did not violate § 2 because Rural's conduct did not harm competition. Petitioner's assertion that the Tenth Circuit has changed the elements of a § 2 claim is thus premised upon a mischaracterization of the actual basis and rationale of the Court of Appeals' decision and does not merit this Court's review.

B. The Court Of Appeals' Decision Does Not Conflict With Any Other Circuit Decision.

Petitioner asserts that "[o]ther Circuits have held that additional proof of competitive harm is not necessary in a case where the traditional elements of monopolization have been found." Pet. at 7. This argument misses the point. The Tenth Circuit held that Rural's decision not to share its white pages listings with Feist was lawful conduct, not anticompetitive conduct, because it did not harm competition. This holding is perfectly consistent with the holdings of other circuits.

The first of the only two cases cited by petitioner in support of its assertion that there is a conflict among the circuits, *Walker v. U-Haul Co. of Missis-*

sippi, 734 F.2d 1068 (5th Cir. 1984), does not contradict the decision below. While the Fifth Circuit's decision in *Walker* preceded this Court's decision in *Aspen Skiing*, which made clear that plaintiffs in § 2 cases must prove injury to competition, the *Walker* court expressly recognized that proof of "*injury to competition . . . is essential* to antitrust recovery: . . . the existence of injury is a component of the substantive right." *Id.* at 1073 (emphasis added).

Cases abound from other circuits articulating this fundamental principle. *See, e.g., Twin Laboratories v. Weider Health Fitness*, 900 F.2d 566, 569 (2d Cir. 1990) (there is no § 2 violation "if the plaintiff cannot allege harm to competition"); *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9, 10 (1st Cir. 1987) (" 'Anticompetitive' also has a special meaning: it refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process"; holding that the plaintiff failed to prove "injury to the competitive process necessary to show a violation of Sherman Act § 2"); *Ralph C. Wilson Industries v. Chronicle Broadcasting Co.*, 794 F.2d 1359, 1363 (9th Cir. 1986) ("We have held that 'it is injury to the market, not to individual firms, that is significant' "); *American Key Corp. v. Cole National Corp.*, 762 F.2d 1569, 1579 n.8 (11th Cir. 1985) ("Harm to competition is a necessary element of all private antitrust suits under Sections 1 and 2 of the Sherman Act").

The only other circuit decision cited by petitioner as potentially conflicting with the decision below is *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986). Pet. at 7-8. But petitioner does not argue that there is an actual conflict between the Court of

Appeals' holding below and *Fishman*. Instead, petitioner speculates that the Court of Appeals "[p]erhaps" was relying on a theory that would conflict with *Fishman*. Pet. at 7. The problem with this argument is that it distorts both the Tenth Circuit's holding here and the Seventh's Circuit's holding in *Fishman*.

The Tenth Circuit in this case held that petitioner failed to prove harm to competition in selling yellow pages advertising, which was a necessary element of petitioner's § 2 claim. Pet. App. 4a-6a. *Fishman* did not, as petitioner suggests, hold that a § 2 plaintiff need not satisfy the harm-to-competition requirement. In fact, the *Fishman* court came to precisely the opposite conclusion, observing that "the antitrust laws seek to protect competition" and holding that a plaintiff in a § 2 case therefore must prove "injury to competition." 807 F.2d at 536.

Moreover, the Seventh Circuit in *Fishman* actually found that the defendant's conduct not only resulted in "harm" to competition but the complete "destruction" of it. *Id.* While the court also noted that the "precise impact of defendant's conduct on the broad consuming public . . . remained unfocused," *id.* at 538, that is simply irrelevant to the question presented here. The *Fishman* court's holding that there theoretically could be harm to competition without proof of harm to consumers is not at all inconsistent with the Tenth Circuit's holding below, which found that Rural's conduct harmed neither competition nor consumers.

C. Regardless Of The Arguments Made In The Petition, The Outcome of This Case Would Be The Same, Making Review In This Court Inappropriate.

Even assuming petitioner's arguments had some merit, which they do not, the district court's judgment for petitioner would have to be reversed on grounds the Court of Appeals expressly declined to decide, namely that the district court's market definition and resulting findings of monopoly power, injury and damages all were clearly erroneous. *See* Pet. App. 2a. Thus, review of the petition would be academic. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (review should be limited to those legal issues that are "beyond the academic or the episodic").

Rural sells yellow pages advertising to merchants who wish to place yellow pages ads in Rural's directory. The majority of Rural's yellow pages advertising revenue comes from merchants located outside Rural's service area, typically merchants in towns that border on Rural's service area.[1] Despite this evidence, the district court erroneously limited the relevant geographic market to the sale of yellow pages advertising to merchants physically located within Rural's service area. Pet. App. 15a-16a. This clearly erroneous market definition, in turn, led the district court to make clearly erroneous findings of monopoly power and injury.[2] Consequently, the outcome of this case would

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[1] *See* Exs. DD, HH, WW, YY, ZZ; Tr. Vol. III at 174-75; Tr. Vol. II at 62.

[2] The district court's flawed definition of the relevant market, if accepted, also would deprive this Court of subject matter jurisdiction. In defining the market, the district court found that

not change even assuming Feist's petition had some merit. Under such circumstances, review by this Court is unwarranted.

CONCLUSION

The Tenth Circuit's decision is consistent with this Court's decisions requiring proof of harm to competition in antitrust cases. Nor is there any conflict among the circuits on this point. Finally, the judgment for petitioner is reversible on numerous grounds not reached by the Court of Appeals. This case therefore does not raise any issue for this Court to review.

Respectfully submitted,

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Rural and Feist, two Kansas corporations, compete for the sale of yellow pages advertising only to merchants physically located within Rural's telephone service area, which is wholly within the State of Kansas. Thus, according to the district court, Feist's antitrust claim under § 2 involved only intrastate conduct by Rural and only intrastate competition between Rural and Feist. The district court's market definition was so exceedingly and unreasonably narrow that it would eliminate any nexus between this case and interstate commerce, thus eliminating subject matter jurisdiction in this Court.